United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

77-1232

to be argued by
HOWARD F. CERNY

In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

B
P/S

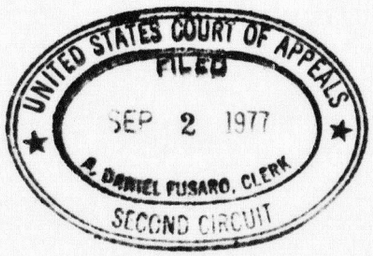
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

CARMINE ROTOLO,
Defendant-Appellant.

PETITION OF CARMINE ROTOLO

FOR RE-HEARING



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United States Court of Appeals

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Docket No. 77-1232

vs.

CARMINE ROTOLO,

Defendant-Appellant.

PETITION FOR RE-HEARING

The Defendant-Appellant petitions this court pursuant to the Federal Rules of Appellate Procedure ("FRAP"), rules 35, 40 & 41 for re-hearing, a re-hearing in banc and a stay of mandate. The petition is made to reverse and correct a judgment of this court rendered on the 19th day of August, 1977, a copy of which was received on August 30, 1977. The Honorable Justices Van Graafeiland, Webster and Dooling presided and affirmed a conviction in the United States District Court for the Eastern District. Said affirmance is sought to be reargued before this court in banc pursuant to the FRAP and prior decisions of this court.

PRELIMINARY STATEMENT

This court has the power and has in the past ordered a re-hearing and

or in banc where it was obvious that the court's decisions were in conflict with the other decisions of the Federal Courts.

This court has stated that on several occasions an in banc hearing will be granted where the original panels decision was in conflict with decisions of other Circuit Courts. (see, Comment 43 FLR 401).

STATEMENT OF FACTS

The petitioner was convicted of six counts of a violation of section 846 of Title 21 of U.S. Code, in addition, it was alledged that the defendant was in violation of Title 21, U.S. Code, section 841 (a) (1) and Title 18, United States Code section 2.

The defendant-appellant had prior to the panel decision in this case requested additional time to file a grievance. This request was based on the fact that plaintiff in this action, moved for and successfully changed the contents of the record on appeal.

The primary action was tried in the Eastern District of New York under allegations and accounts of conspiracy and aiding and abetting. No direct substance count was tried to or presented to the jury.

The U.S. Attorney was forced to use the conspiracy and aiding and abetting counts since none of the alledged transaction ocurred within the jurisdiction of the Eastern District of New York.

The panel was advised of Rotolo's intention that he could not be convicted of possession and possession with intent to distribute as two separate and substantive crimes. The panel without writing decision that this office has been able to secure, has affirmed that multiple convictions without comment.

This apparent affirmance is in direct contradiction to the well settled law of other circuit courts.

POINT ONE

THE DEFENDANT-APPELLANT MAY NOT LEGALLY BE CONVICTED OF BOTH POSSESSION AND POSSESSION WITH INTENT TO SELL SEC. 841 U. S. CODE, TITLE 21.

The case was tried in the Eastern District of New York under counts of conspiracy and aiding and abetting. No direct substantive count was actually tried or presented to the jury.

The U. S. Attorney's Office was forced to use the conspiracy and aiding and abetting counts since none of the alleged transactions occurred within the jurisdiction of the Eastern District of New York.

The panel was advised of Rotolo's position that he could not be convicted of possession and possession with intent to distribute as two separate and substantive crimes. The panel without writing a decision that this office has been able to secure, has affirmed that multiple conviction without comment.

This apparent affirmance is in direct contradiction to the well settled law of other jurisdictions. The leading case, although a district court decision, United States V. Nichols, 401 F. supp. 1377, has clearly considered this issue and rendered a scholarly and precise opinion. It states, unequivocally, that a party charged pursuant to section 841 (a) (1) may not be convicted and sentenced to both possessing and distributing a controlled substance [illegible]ed unequivocally, in citing a Supreme Court decision, Milanovic a V. United States, 365 U. S. 551, 81 Supreme Court 728. 5 L. Ed. 773, that a verdict may be returned upon "either count but not both". The same court went on to analyze the prejudicial effect of these multiple counts and stated that "the court

cannot overlook the prejudicial effect that a multi-count indictment would potentially have on a jury". The sixth Circuit Court of Appeals in their 1975 decision, U.S. v. Stevens, 521 F. 2d 334, further analyzed multiple counts under Section 841. The sixth Circuit after extended research came to essentially the same conclusion, agreeing with the Fourth Circuit case, United States v. Atkinson, 512 F. 2d, 1235, in adopting the principle enunciated by the Supreme Court of the United States in Prince v. United States, 352 U.S. at 322, 77 Sup. Ct. 403, that multiple convictions from a single transaction may not be tolerated. It cited with approval its own decision in United States v. Upthegrove, 504 F. 2d 682 that a simple possession charge was a lesser and included offense within the charge of possession with intent to distribute and that the defendant could not have been convicted and sentenced on both charges. The judgement of conviction itself must be reversed and the case sent down for retrial.

Essentially, this petition for rehearing in banc simply requests this court to hear and determine on a proper record whether the United States Court of Appeals for the Second Circuit agrees with its sister courts or for some reason will refuse to follow these well reasoned decisions. Under either event, this court should write a clear and authoritative opinion concerning multiple charges based on a single transaction. Certainly the value of such an opinion to this defendant and future defendants is apparent to the court.

POINT TWO

THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS FORCED TO APPEAL FROM A CORRECTED RECORD.

Previous papers on file with this court clearly indicate that the Government through the U.S. Attorney successfully changed the record on appeal prepared by Rotolo's counsel which formed the basis of his first brief. Even after correction, this court was in a position to grant Rotolo relief, i.e. give him an opportunity to file his brief based on the corrected record. This Court, however, refused to grant him an opportunity to file a brief based on the corrected record and Rotolo therefore was compelled to file his reply brief based on a corrected record, although his original brief was based on the record prior to correction. Since the Federal Rules of Appellate Procedure clearly give the defendant Rotolo an opportunity to appeal it would be implicit that this opportunity to appeal be based on a true and correct copy of the record. The Court's denial of an opportunity to file his original brief based on the corrected record was in violation of the defendant Rotolo's right under the Federal Rules of Appellate Procedure and therefore it deprived him of his constitutional right of due process, especially inasmuch as the correction dealt with substantial facts on which defendant relied in preparing his original brief.

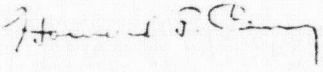
As the record now stand it is apparently the decision of this Court

that the defendant may appeal but the record from which he has appealed may be changed at the discretion of the Court upon the request of the U.S. Attorney and the defendant has no right to file an original brief or appeal from a true and complete copy of the transcript. This is a position that the Court should not accept, or, if it does accept this position, it should be only after full hearing and a precise written decision.

CONCLUSION

For all the reasons set forth above and in our papers resubmitted and filed with this Court, the petition should be granted and the mandate of this court should be returned to be reviewed by this court sitting in banc.

Respectfully submitted,



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AFFIRMATION O SERVICE BY MAIL

ROMEO JULIUS BARROS, an attorney admitted to practice in the State of New York, affirms under penalty of perjury, that affirmant is not a party to the action, is over 18 years of age and resides at 153 East 43rd Street, New York, N. Y. 10017. That on the 2nd day of September, 1977, affirmant served the within PETITION on the Hon. David G. Trager, United States Attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, the address designated by said attorney for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in a post office under the exclusive care and custody of the United States post office department within the State of New York.

Affirmed on

September 2, 1977

Romeo Julius Barros

Romeo Julius Barros